

Vermont Department of
Financial Regulation

Securities Division Bulletin 14-01-S

Guidance on Preparing Offering Documents under
the Vermont Small Business Offering Exemption (“VSBOE”)

This Bulletin is designed for small businesses that may be considering raising capital through a VSBOE offering. It is intended to provide clarification primarily as to the contents of an offering document, certain financial disclosures and other disclosure requirements and aims to summarize other key considerations. It is not intended to be comprehensive or cover every topic relevant to a securities offering.

VSBOE was designed as a user friendly way for Vermont businesses to raise money directly from fellow Vermonters. In that spirit, the Securities Division of the Department of Financial Regulation (the “Securities Division”) has issued this Bulletin in an effort to help guide small business owners in preparing their VSBOE offering documents.

The purpose of the VSBOE offering document is to provide potential investors with material information concerning one’s business and the offering so that they have information necessary to evaluate the offering in deciding whether to invest. In conducting VSBOE offerings, it is important to remember that it is unlawful to “make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading.” (See VSBOE § (m)). Practically speaking, this means that misrepresenting, concealing or failing to disclose information that a reasonable investor would consider material in making the decision to invest may constitute securities fraud. Because of this, full and accurate disclosure is critical.

We encourage those contemplating a VSBOE offering to consult legal counsel and/or contact the Division early in their planning process to discuss questions and concerns.

I. Disclosure of Financial Statements

VSBOE requires that companies raising between one million and two million dollars disclose audited financial statements to each prospective investor; however, the Division wishes to provide guidance as to the proper financial disclosure for those companies seeking to raise one million dollars or less.

As outlined below, the appropriate level of financial disclosure depends on the operational history of the company and the nature of the fund raise.

- (1) Companies with less than a year of operating history: Companies with very limited or no operational history obviously will be unable to provide historical financial statements. However, the Division still would expect these companies to provide a balance sheet

listing their assets and liabilities in their offering document. The balance sheet need not be audited and may be prepared internally.

(2) Companies with more than a year of operating history: Companies with more than a year of operating history should provide balance sheets and income statements for the three most recent fiscal years in which they operated. These balance sheets and income statements need not be audited and may be prepared internally; however, the Securities Division expects a company with audited or unaudited financial statements prepared by a third party to include them with the company's offering document.

(3) Companies issuing preferred stock or debt instruments: Companies wishing to offer preferred stock or issue debt instruments under VSBOE shall include, in addition to balance sheets and income statements, statements of cash flow for the three previous fiscal years.

Companies who do not have a full year of operational history or are unable to show either (i) that "Net Cash Provided by Operating Activities" was positive for the last fiscal year or (ii) that "Adjusted Net Earnings" for the last fiscal year are sufficient to pay the company's dividend or interest obligations, should not make a preferred stock or debt offering.

Further, in connection with preferred stock offerings, a company must disclose:

- Whether dividends on the preferred stock are cumulative;
- The risks of failure to declare or pay dividends on the preferred stock; and
- The equity characteristics of any convertible preferred stock being offered.

II. Financial Condition Discussion

In addition to financial statements, companies making an offering under VSBOE should provide a narrative discussion of their financial condition. This discussion should address, to the extent material, the company's historical results of operations in addition to its liquidity and capital resources. If a company does not have a prior operating history, the discussion should focus on financial milestones and operational, liquidity and other challenges. If a company has a prior operating history, the discussion should focus on whether historical earnings and cash flows are representative of what investors should expect in the future. A company's discussion of its financial condition should take into account the proceeds of the offering and any other known or pending sources of capital. Companies also should discuss how the proceeds from the offering will affect their liquidity and whether these funds and any other additional funds are necessary to the viability of the business. In addition, companies should describe the other available sources of capital to the business, such as lines of credit or required contributions by principal shareholders.

III. Other Disclosure Items

Companies making a VSBOE offering should also disclose the following information in their offering documents:

- a description of the business of the company and the anticipated business plan of the company;
- a description of the stated purpose and intended use of the proceeds of the offering sought by the company with respect to the target offering amount;
- a description of the ownership and capital structure of the company including the company's existing debt;
- a description of the specific and general potential risks facing the company;
- a description of the potential risks of investing in the offering;
- the name, legal status and physical address of the company;
- the names of the directors and officers (and any persons occupying a similar status or performing a similar function), and each person holding more than 20 percent of the shares of the company;
- prominent disclosure that the offering is only available for Vermont residents;
- prominent disclosure that the maximum investment per person is \$10,000; unless the person is an accredited investor;
- whether the offering has a minimum raise amount, the deadline for reaching that goal and what will happen if the goal is not reached; and
- the price to the of the securities and the method for determining the price.

IV. Plain English Disclosure

The Division does not prescribe a set format for the offering document; however, companies should strive to write such documents in plain English.

Plain English writing does not mean deleting complex information to make the offering document easier to understand. For investors to make informed decisions, disclosure documents must sometimes impart complex information. Using plain English assures the orderly and clear presentation of complex information so that investors have the best possible chance of understanding it.

While not required under Vermont law, issuers may wish to consult the U.S. Securities and Exchange Commission's ("SEC['s]") Plain English Writing Handbook (the "Handbook") for additional tips and guidance on drafting plain English disclosures. If you wish to consult the Handbook, it can be located at: <https://www.sec.gov/pdf/handbook.pdf>.

V. Jurisdictional and Investor Requirements

Intrastate Offering / SEC Rule 147 / Vermont Residency

VSBOE offerings are exempt from federal securities registration under the "intrastate offering exemption." See SEC Rule 147, 17 C.F.R. § 230.147. This exemption facilitates the financing of local business operations. Therefore, your company must:

- be organized in Vermont;
- carrying out a significant amount of its business in Vermont; and
- making offers and sales only to residents of Vermont.

If a company holds significant assets outside of Vermont, or derives a substantial portion of its revenues outside Vermont, it may have difficulty qualifying for the exemption. Accordingly, one should consult with legal counsel to ensure the requirements of Rule 147 are met.

Further, a company must determine whether each investor is a resident of the State of Vermont. Accordingly, a company should clearly outline the residency requirement in its offering documents and obtain a certification from each investor that they are a resident of the State of Vermont. Typically, this certification, and the ones below, would be made in the investor's subscription documents and would be kept by the issuer in case the issuer is later asked to produce it.

Knowledgeable Investor Standard

VSBOE requires that an investor possesses such knowledge, either alone or through a representative, to be capable of evaluating the merits and the risks of their investment. Accordingly, a company should clearly outline the knowledge requirement in its offering documents and obtain a certification from each investor that they have read and understood the offering document and the risks associated with their investment and are capable of making such determinations.

Accredited Investor

VSBOE limits the amount an individual can invest in a VSBOE offering to \$10,000 unless an investor qualifies as an accredited investor. An accredited investor is able to invest any amount and theoretically could fund the entire offering. The definition of an accredited investor can be found on the SEC's website here: <https://www.sec.gov/answers/accred.htm>.

Accordingly, a company should clearly outline the individual investment limit of \$10,000 in its offering documents and obtain a certification from each accredited investor, if any, seeking to make an investment over \$10,000 that they qualify under the SEC's definition as an accredited investor.

VI. Use of Websites and Social Media

Vermont law allows the use of websites and social media to promote a VSBOE offering; however, the Securities Division provides the following guidance to ensure an offer does not inadvertently run afoul of federal securities laws.

The SEC has issued recent guidance outlining their requirements regarding general advertising or solicitation of offerings through websites and social media for intrastate offerings such as VSBOE. Under the SEC guidance, general advertising or solicitation of

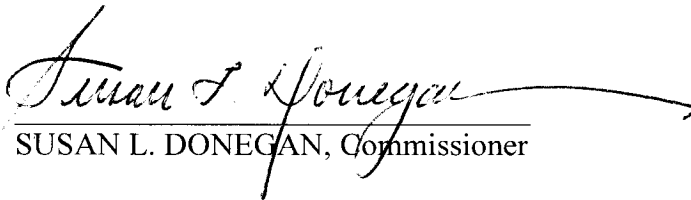
one's offering through websites and social media may be permissible; however, SEC requires the following:

- **before** investors can access offering documents, subscription agreements, fact sheets etc., located on a company's website or social media accounts, the prospective investor must certify they are a resident of Vermont (e.g., via check box certification on a landing page); and
- the website and social media must clearly indicate that the offer is only available to residents of Vermont (e.g., on the landing page and other pages pertaining to the offering).

Failure to follow the above, could, in principle, subject the issuer to the SEC's enforcement authority.

Please note that the positions stated above do not necessarily contain a fully discussion of all material considerations necessary when preparing an offering document. We encourage those contemplating a VSBOE offering to contact legal counsel and/or the Division early in their planning process to discuss questions and concerns. Questions and concerns may be directed to Michael Pieciak, Deputy Commissioner of Securities at Michael.Pieciak@state.vt.us.

Dated at Montpelier, Vermont this 16th day of June, 2014.



SUSAN L. DONEGAN, Commissioner